

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CORY NAROG,

No. C 09-1696 MMC

Petitioner,

**ORDER DENYING FIRST AMENDED  
PETITION FOR WRIT OF HABEAS  
CORPUS**

v.

CALVIN REMMINGTON,

Respondent.

Before the Court is petitioner Cory Narog's First Amended Petition for Writ of Habeas Corpus ("FAP"), filed August 26, 2009. Respondent Calvin Remmington has filed an answer; petitioner did not file a traverse. Having read and considered the papers filed in support of and in opposition to the FAP,<sup>1</sup> the Court rules as follows.

**BACKGROUND**

In March 2006, in the Superior Court of California, in and for the County of San Mateo, a jury found petitioner guilty of eleven counts of contempt, in violation of section 166(a)(4) of the California Penal Code, a misdemeanor. Specifically, petitioner was

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<sup>1</sup>On October 29, 2009, petitioner filed a Motion for Evidentiary Hearing and for Permission to Conduct Discovery; thereafter, respondent filed opposition, to which petitioner replied. By order filed December 7, 2009, the Court denied the motion as premature. To the extent the parties included in their briefing of the motion, however, argument pertaining to the merits of petitioner's claims, the Court has considered such argument in connection with its determination herein.



1 “[I]t is the habeas applicant’s burden to show that the state court applied [clearly  
 2 established federal law] to the facts of his case in an objectively unreasonable manner.”  
 3 Woodford v. Visciotti, 537 U.S. 19, 25 (2002).

4 For purposes of § 2254(d), in determining whether the state court’s rejection of a  
 5 federal claim is unreasonable, the district court considers the “last reasoned decision”  
 6 issued by a state court, see Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991), which, in  
 7 this instance, is the Superior Court’s order of October 22, 2007.

## 8 DISCUSSION

9 In his FAP, petitioner asserts the following claims: (1) petitioner was deprived of due  
 10 process when the prosecution allegedly failed to disclose exculpatory evidence; and  
 11 (2) petitioner was deprived of his right to the effective assistance of counsel, when trial  
 12 counsel (a) failed to obtain the allegedly exculpatory evidence, and (b) did not present to  
 13 the trial court a “Marsden”<sup>3</sup> motion petitioner allegedly had prepared.

### 14 A. Disclosure of Exculpatory Evidence

15 Petitioner’s first claim is directed to Count Nine of the Complaint.

16 Counts One through Nine alleged violations occurring on nine separate dates and, in  
 17 each instance, that petitioner willfully violated the restraining order by driving into the  
 18 driveway of a neighbor whose driveway was located within fifty yards of the Ballack  
 19 residence, i.e., the area in which petitioner was prohibited from entering under the terms of  
 20 the restraining order. Specifically, Counts One through Eight were based on an allegation  
 21 that, on eight separate dates in May 2005, petitioner drove into the driveway of Raymond  
 22 Fung (“Fung”), and Count Nine was based on an allegation that, on June 27, 2005,  
 23 petitioner drove into the driveway of Joan Pace (“Pace”).

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 26 <sup>3</sup>In People v Marsden, 2 Cal. 3d 118 (1970), the California Supreme Court, in  
 27 addition to acknowledging an indigent defendant’s right to discharge or substitute appointed  
 28 counsel where “the first appointed counsel is not adequately representing the accused,”  
 held that such defendant, in support of a motion to substitute new counsel, is entitled to an  
 opportunity to be heard and to “present argument or evidence.” See id. at 123-24.

1 During her closing argument, the prosecutor relied on Fung's testimony to support a  
2 conviction on Counts One through Eight. Fung testified that, after the restraining order had  
3 issued, he saw petitioner drive into Fung's driveway, and that, in response, he then  
4 installed a video surveillance camera that overlooked his driveway, which camera was set  
5 to record twenty-four hours a day, with the exception of days on which Fung was away on  
6 vacation. (See Tr. 254-55.) Fung also testified that he "transfer[red] the sections [of the  
7 tapes] that [he] thought were valuable onto DVDs." (See Tr. 257.) The prosecution played  
8 portions of the DVDs to the jury (see Tr. 262-64), one of which, the prosecutor argued,  
9 showed the conduct alleged in Counts One through Eight, specifically, petitioner's driving  
10 into Fung's driveway on various dates in May 2005 (see Tr. 358).

11 With respect to Count Nine, the prosecutor relied on the testimony of both Pace and  
12 Elayne Spencer, Pace's daughter, each of whom testified she saw Fung drive into Pace's  
13 driveway on June 27, 2005. (See Tr. 174-75, 180-81, 358.)

14 In his petitions for a writ of habeas corpus filed in state court, petitioner claimed that  
15 the prosecution, in violation of Brady v. Maryland, 373 U.S. 83 (1963), deprived petitioner of  
16 due process by failing to disclose allegedly exculpatory evidence pertaining to Count Nine.  
17 Specifically, petitioner argued, the prosecution had not disclosed to him any videotape  
18 recorded by Fung on June 27, 2005; according to petitioner, had the prosecution disclosed  
19 such recording, it would have shown petitioner had not driven by Fung's residence on that  
20 date, and, consequently, that he could not have driven into Pace's driveway.<sup>4</sup>

21 The Superior Court denied petitioner's Brady claim, for the reason that petitioner had  
22 failed to offer any evidence to support a finding that Fung possessed a videotape of  
23 activities occurring on June 27, 2005, much less that the prosecution was in possession or  
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26 <sup>4</sup>At the time of the violations, Fung lived next door to petitioner, and Pace lived next  
27 door to Fung. (See Tr. 139-41.) As noted, the subject street is a cul-de-sac, such that a  
28 person driving toward Pace's residence necessarily would first pass Fung's residence. It  
appears to be petitioner's theory that Fung's camera was positioned such that it would have  
recorded every vehicle driving by the front of Fung's residence.

1 control of such a videotape.<sup>5</sup> The Superior Court also noted that, to the extent any  
2 evidence had been offered relevant to the issue, such evidence did not support petitioner's  
3 theory. In particular, the court observed, Fung had testified at trial that he transferred onto  
4 DVDs the portions of the videotapes he thought were important, and thus a reasonable  
5 inference could be drawn that Fung had "periodically transferred relevant portions of the  
6 videotapes to his computer and then reused the tapes." (See Resp't's Mot. to Dismiss. Ex.  
7 B attached to Ex. 1 at 2.)

8 As set forth below, petitioner fails to show the Superior Court's decision was contrary  
9 to, or involved an unreasonable application of, clearly established federal law, or was  
10 based on an unreasonable determination of the facts presented.

11 A prosecutor's duty to disclose exculpatory evidence under Brady extends only to  
12 exculpatory "information within the possession or control of law enforcement personnel";  
13 such duty does not require the prosecution to disclose "information that it does not possess  
14 or of which it is unaware." See United States v. Chen, 754 F.2d 817, 824 (9th Cir. 1985).  
15 Here, petitioner fails to point to any evidence in the record to support a finding that Fung  
16 possessed a videotape of any activities occurring on June 27, 2005. Further, and more  
17 significantly, even assuming, arguendo, Fung possessed a videotape that showed  
18 petitioner never drove in front of Fung's residence on June 27, 2005, petitioner fails to  
19 identify any evidence in the record to support a finding that the prosecution was aware of  
20 such a videotape, or that such videotape was in the possession or control of any law  
21 enforcement personnel. In short, petitioner's assertion that such a videotape existed and  
22 that the prosecution failed to disclose evidence material to the defense constitutes no more  
23 than speculation.

24 To the extent petitioner argues the state courts erred in not affording him an  
25 opportunity to depose Fung, apparently to afford petitioner an opportunity to discover  
26 whether Fung had in fact recorded an exculpatory videotape and/or so informed the

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28 <sup>5</sup>In the instant case, as noted above, the "last reasoned decision" implicated by the  
petition, see Ylst, 501 U.S. at 803-04, is the Superior Court's order of October 22, 2007.

prosecution, petitioner's claim fares no better.<sup>6</sup> Petitioner fails to cite any authority recognizing a federal right to take a postjudgment deposition in an effort to determine in the first instance whether the deponent might be aware of evidence that could assist the petitioner in collaterally challenging a state court conviction. Indeed, as the Supreme Court has held, even in the context of pretrial proceedings, "[t]here is no general constitutional right to discovery in a criminal case, and Brady did not create one." See Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

Accordingly, petitioner has failed to show he is entitled to relief on this claim.

## **B. Ineffective Assistance of Counsel**

Petitioner alleges his trial counsel provided ineffective assistance of counsel by (1) failing to request from the prosecution all videotapes Fung had recorded, and (2) failing to present to the trial court a Marsden motion petitioner allegedly had prepared.

As set forth below, petitioner again fails to show the Superior Court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, or was based on an unreasonable determination of the facts presented.

### **1. Failure to Obtain Videotapes**

In his state court petitions, petitioner, citing Strickland v. Washington, 466 U.S. 668 (1984), argued that his trial counsel provided ineffective assistance of counsel by failing to request from the prosecution a copy of all videotapes made by Fung. As discussed above, petitioner takes the position that, had such videotapes been disclosed, the videotape of activities occurring on June 27, 2005 would have shown petitioner had not driven in front of the Fung residence on that date.

"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components." Id. at 687. "First, the defendant must show that counsel's performance was deficient." Id. "Second, the defendant must

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<sup>6</sup>In his state court petitions, petitioner requested, without elaboration or citation to any authority, that he be allowed to depose a number of individuals, including Fung. In denying the petition, the Superior Court did not expressly address that request.

1 show that the deficient performance prejudiced the defense.” Id. “This requires showing  
2 that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose  
3 result is reliable.” Id.

4 Here, the Superior Court found that any failure by trial counsel to request from the  
5 prosecution a copy of all videotapes recorded by Fung did not prejudice petitioner. In  
6 particular, as discussed above, the Superior Court found petitioner had offered no  
7 evidence to support a finding that all such videotapes were retained and still existed.  
8 Petitioner fails to show such finding by the Superior Court is contrary to the record.  
9 Consequently, in the absence of any evidence that the prosecution was in control or  
10 possession of a videotape that contained arguably exculpatory evidence, petitioner cannot  
11 establish he was prejudiced by any failure on the part of his counsel to request such  
12 evidence from the prosecution.<sup>7</sup> Further, to the extent petitioner argues, in the instant  
13 petition, that the state courts should have allowed him to depose his trial counsel, such  
14 argument likewise is unavailing, because, as discussed above with respect to petitioner’s  
15 Brady claim, petitioner fails to cite any authority recognizing a federal right to take a  
16 postjudgment deposition in an effort to determine in the first instance whether the deponent  
17 may be aware of evidence that could assist the petitioner in collaterally challenging a state  
18 court conviction.

19 Accordingly, petitioner has failed to show he is entitled to relief on this claim.

## 20 **2. Failure to Present Marsden Motion**

21 Petitioner’s second claim is directed to all the counts on which he was convicted.

22 In his state court petitions, petitioner alleged he had prepared a Marsden motion and  
23 had requested that his appointed trial counsel submit it to the trial court. Petitioner further  
24 alleged that the trial court never ruled on the motion because his trial counsel did not  
25 submit it to the court. Citing United States v. Cronin, 466 U.S. 648 (1984), petitioner  
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27 <sup>7</sup>Indeed, petitioner offers no evidence that his counsel did not request all relevant  
28 and available discoverable materials from the prosecution. Rather, petitioner seems to  
assume that if such videotape was not produced, it was not requested.



1 contended such asserted failure by counsel was an act “in direct opposition to his client,”  
2 and, consequently, that petitioner was entitled to relief “without the necessity of proving  
3 prejudice.” (See Resp’t Mot. to Dismiss. Ex. 1 at 19.)

4 In addressing petitioner’s argument, the Superior Court first noted: “[Cronic] stands  
5 for the proposition that where there is a complete denial of counsel or there is a complete  
6 breakdown in the adversarial process – for example, where a court order prevented  
7 defense counsel from cross-examining effectively – a defendant is entitled to reversal  
8 without a showing of prejudice.” (See id. Ex. B attached to Ex. 1 at 4). Next, the Superior  
9 Court found petitioner had not shown that his counsel’s asserted failure to present a  
10 Marsden motion was “tantamount to no representation at all under Cronic” (see id.) and,  
11 consequently, petitioner was required to demonstrate prejudice under the standards set  
12 forth in Strickland, a showing the court held petitioner had not made.

13 In the instant petition, petitioner does not contend the Superior Court’s finding is  
14 erroneous if Strickland applies; rather, petitioner argues, the Superior Court’s interpretation  
15 and application of Cronic was unreasonable, in that he should not have been required to  
16 show he was prejudiced as a result of the trial court’s not having considered the Marsden  
17 motion.

18 In Cronic, the Supreme Court discussed three “circumstances [involving a  
19 defendant’s counsel] that are so likely to prejudice the accused that the cost of litigating  
20 their effect in a particular case is unjustified.” See Cronic, 466 U.S. at 658. Thereafter, the  
21 Supreme Court summarized those three circumstances as follows:

22 First and most obvious was the complete denial of counsel. A trial would be  
23 presumptively unfair, we said, where the accused is denied the presence of  
24 counsel at a critical stage, a phrase we used in [two prior cases] to denote a  
25 step of a criminal proceeding, such as arraignment, that held significant  
26 consequences for the accused. Second, we posited that a similar  
27 presumption was warranted if counsel entirely fails to subject the  
28 prosecution’s case to meaningful adversarial testing. Finally, we said that in  
cases like Powell v. Alabama, 287 U.S. 45 (1932), where counsel is called  
upon to render assistance under circumstances where competent counsel  
very likely could not, the defendant need not show that the proceedings were  
affected.

See Bell v. Cone, 535 U.S. 685, 696-97 (2002) (internal quotations, citations, alterations



1 and footnote omitted).

2       Petitioner cites to no authority holding the failure of counsel to file or the court to  
3 hear a Marsden motion is itself a circumstance of the magnitude identified in Cronic and  
4 Bell. Indeed, the Ninth Circuit has rejected such an argument. In particular, in Schell v.  
5 Witek, 218 F.3d 1017 (9th Cir. 2000), the Ninth Circuit rejected the petitioner's argument  
6 that the trial court's failure to rule on a Marsden motion was "prejudicial per se." See id. at  
7 1025-28. Rather, as the Ninth Circuit explained, whether a petitioner is required to make a  
8 showing of prejudice is dependent upon the petitioner's showing with respect to the  
9 grounds for such motion. See id. at 1027 (noting "not every conflict or disagreement  
10 between the defendant and counsel implicates Sixth Amendment rights"). If, for example,  
11 the petitioner shows that the unresolved Marsden motion was based on a theory that "a  
12 serious conflict [ ] exist[ed] that resulted in the constructive denial of assistance of counsel,"  
13 and the petitioner further establishes such a conflict actually existed, the trial court's failure  
14 to rule on such motion would constitute prejudicial error per se. See id. at 1027-28. By  
15 contrast, if the unresolved Marsden motion was based on a "serious conflict [that] did not  
16 rise to the level of a constructive denial of counsel," the petitioner would be required to  
17 establish prejudice. See id. at 1028 (citing Strickland, 466 U.S. at 691-92).

18       In Schell, the petitioner therein had set forth in his federal petition a relatively  
19 detailed description of a conflict he asserted existed between himself and his appointed  
20 counsel, which allegations the Ninth Circuit found sufficient to entitle him to an evidentiary  
21 hearing on his claim. See id. at 1026. Here, by contrast, petitioner has not offered a copy  
22 of his Marsden motion or described in any of his petitions either the extent or nature of any  
23 conflict or other deficiency in representation that he had identified in such motion. As a  
24 consequence, the issue presented herein is whether an appointed counsel's failure to  
25 present a Marsden motion, irrespective of its content, constitutes the type of conduct from  
26 which prejudice is presumed. Based on the above-discussed case authority, the Court  
27 finds it does not.

28       Nor does the record support a finding of any other circumstance obviating the need

1 for a showing of prejudice and, indeed, petitioner has not argued any such circumstance  
2 exists. Trial counsel did not “entirely fail[ ] to subject the prosecution’s case to meaningful  
3 adversarial testing,” see Bell, 535 U.S. at 696, as evidenced by trial counsel’s having cross-  
4 examined witnesses called by the prosecution, offered petitioner’s testimony in the defense  
5 case, and made both an opening statement and a closing argument, and there is no  
6 showing that trial counsel was required to defend petitioner under “circumstances where  
7 competent counsel very likely could not.” See id.; cf. Powell, 287 U.S. at 56, 60, 71  
8 (holding defendant charged with capital crimes was deprived of due process, where  
9 counsel was not appointed until first date of jury trial and was given no opportunity to  
10 investigate). In sum, the Court finds the Superior Court’s determination was neither  
11 contrary to nor involved an unreasonable application of Cronic or any other federal  
12 authority.

13 Accordingly, petitioner has failed to show he is entitled to relief on this claim.


14 **CONCLUSION**

15 For the reasons set forth above, the First Amended Petition is hereby DENIED.

16 The Clerk shall enter judgment accordingly.

17 **IT IS SO ORDERED.**

18  
19 Dated: June 23, 2010

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MAXINE M. CHESNEY  
United States District Judge